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No. 94-2097

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

THOMAS SHANNON and CRAIG BROOKS,

Petitioners,

vs.

CITY OF SANTA ANA, CITY OF COSTA MESA, PAUL WALTERS, DAVE SNOWDEN, WILLIAM LETIZIO, RAUL LUNA, MICHAEL FLEET, PAUL E. McCARTHY, ROBERT DURHAM, and BURTON SANTEE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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54 pp

QUESTIONS PRESENTED

1. Where a law enforcement official uses or approves the novel use of a weapon, like dogs, to attack and seriously injure persons and the official knows or should know that the weapon creates a substantial risk of causing serious injury or death in violation of the lethal force rule of *Tennessee v. Garner*, 471 U.S. 1 (1985), is the official entitled to qualified immunity because no court has held that the novel weapon is subject to the *Garner* lethal force rule?

2. Does the objective reasonableness standard of *Graham v. Connor*, 490 U.S. 386 (1989) apply to a post-arrest seizure of a person who escaped from police custody?

3. Does a person, under the objective reasonableness standard of *Graham v. Connor*, 490 U.S. 386 (1989), have a constitutional right of self-defense when attacked a dog likely to inflict serious injury, or may the police demand that the person passively submit when attacked by the dog?

4. Where police use of force violates well-established and fundamental police standards for the use of force, under the objective reasonableness standard of *Graham v. Connor*, 490 U.S. 386 (1989), may a court ignore that evidence and all expert testimony that the use of force was unnecessary and dangerous?

LIST OF PARTIES

Petitioners Thomas Shannon and Craig Brooks were plaintiffs and appellants in the courts below. Respondents City of Santa Ana, City of Costa Mesa, Santa Ana Police Chief Paul Walters, Costa Mesa Police Chief Dave Snowden, Santa Ana Police Officers William Letizio, Raul Luna, Michael Fleet, and Anthony Bertana, and Costa Mesa Police Officers Paul E. McCarthy, Robert Durham and Burton Santee, were the defendants and appellees in the courts below.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

THOMAS SHANNON and CRAIG BROOKS,

Petitioners,

vs.

CITY OF SANTA ANA, CITY OF COSTA MESA, etc.,

Respondents.

Petitioners Thomas Shannon and Craig Brooks respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed in this proceeding on February 3, 1995.

OPINION BELOW

The decision of the Court of Appeals was not reported. It appears in the Appendix hereto [hereinafter "Apx."], Appendix A. No opinion was rendered by the District Court for the Central District of California. The judgment of the district court appears as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was filed on February 3, 1995. Apx. A-1. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on March 22, 1995. Apx. B-1. This petition for certiorari was filed June 20, 1995, 90 days within March 22, 1995. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Code, Title 42:

§ 1983. Civil Action for Deprivation of Rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Proceedings Below

Petitioners Thomas Shannon and Craig Brooks filed a complaint against defendants alleging causes of action under 42 U.S.C. § 1983. Respondents City of Santa Ana, City of Costa Mesa, Santa Ana Police Chief Paul Walters, Costa Mesa Police Chief Dave Snowden, Santa Ana Police Officers William Letizio, Raul Luna, Michael Fleet, and Anthony Bertana, and Costa Mesa Police Officers Paul E. McCarthy, Robert Durham and Burton Santee, filed motions for summary judgment which were granted. Petitioners appealed. The Ninth Circuit affirmed.

B. Statement Of Facts

1. Thomas Shannon.

On June 29, 1991, Mr. Shannon was driving home with a friend when he argued with her, pulled the car over, and walked away. AER[1] 576-76A. Costa Mesa police officer claimed that he saw Mr. Shannon walking away from the car, yelled at him to stop, but that Mr. Shannon ran away and jumped over a fence into a backyard. AER 160. Mr. Shannon's friend identified him and said he was drunk. AER 167. Santee arrived and called for a police dog. AER 218; *see also* AER 172.

Santa Ana police officer Letizio responded with a dog. Letizio, his dog, and McCarthy entered the back yard. Letizio gave Santa Ana's standard "canine announcement," one time, in conformity with Santa Ana policy: "This is the police. We're

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[1] "AER" refers to Appellants' Excerpts of Record, the record before the Ninth Circuit.

going to use a police dog to find you. If you surrender now, the dog will not be used. You have 30 seconds." AER 78, 443. In accordance with policy, Letizio said nothing about the possibility that the dog might bite. *Id.* Letizio waited 30 seconds and after receiving no indication that anyone had heard the announcement, released the dog. AER 78, 444.

Mr. Shannon remembers nothing of the entire dog attack. Letizio and McCarthy's account follows. Within ten seconds, the dog "alerted" near some bushes. Without giving any further announcements or warnings, Letizio permitted the dog to enter the bushes. Two to three seconds later, Letizio heard sounds of a struggle, then heard Mr. Shannon screaming. After another two to three seconds, Letizio saw Mr. Shannon roll out of the bushes, the dog biting Mr. Shannon's right elbow. Letizio watched as Mr. Shannon struggled to free his right arm, told him to stop "fighting with the dog" and to raise his left hand in the air. Mr. Shannon did not respond but continued to "fight with the dog," grabbing the dog by the head. AER 172-73, 447, 473.

Five to ten seconds after the dog attacked Mr. Shannon, Letizio asked McCarthy to have two additional officers come to the backyard. AER 478, 484. Letizio kept yelling at Mr. Shannon to stop "fighting with the dog." Mr. Shannon again did not respond but continue to struggle with the dog by attempting to punch the dog in the head and trying "to get the dog in a head lock as if to dislodge the dog from his bite." AER 173-74. The dog continued to bite Mr. Shannon in the right elbow as Mr. Shannon rolled around on the ground. The two additional officers came into the back yard while Mr. Shannon was rolling around on the ground, screaming, with the dog biting him. AER 174, 484-86. McCarthy knew that the dog was hurting and injuring Mr. Shannon. AER 486. Because Mr. Shannon continued his "fight with the K-9," Letizio and McCarthy kept their distance and again requested Mr.

Shannon to "discontinue his fight with the K-9." Mr. Shannon, however, continued to roll around in the bushes pulling the dog over the top of him and continued "to try to put a head lock on the dog." AER 174. Letizio approached Mr. Shannon and tried to grab Mr. Shannon's left arm, but Letizio could not hold on because Mr. Shannon's arm was covered with blood and slippery. Letizio again told Mr. Shannon to "quit fighting the dog" and to "put his left hand out." According to Letizio, at this point Mr. Shannon put his arm out and McCarthy put a handcuff on it. Then, Letizio was "in a position where [he] could gain control" of the dog, so he grabbed the dog by the collar and called it off. AER 174. According to respondents, the attack lasted 30-45 seconds. AER 79, 480.

According to medical records, the dog bit Mr. Shannon in the *neck* and in *both* arms. The neck wound was approximately 3 cm in length, over the right carotid area, exposing the external jugular vein. The *right* arm had a gaping wound with exposed musculature at the level of the radial aspect of the forearm just distal to the elbow. Mr. Shannon could not extend his right wrist or his right and little fingers. The *left* arm had three wounds, each approximately 1.5 to 1 cm in length. AER 73.

Mr. Shannon was taken by ambulance for emergency medical care. Under general anesthesia, Dr. Leonard Prutsok, M.D., a plastic surgeon, cleaned the wounds of grass and debris, extensively cut away damaged tissue, and attempted to repair four separate right arm lacerations, three measuring 3 cm and one measuring 1.5 cm. This included repairs of the extensor brachial radialis, extensor carpi radialis longus, extensor carpi radialis brevis, extensor digitorum communis, flexor digitorum superficialis, and neuroplasty of the median and radial nerves. Mr. Shannon's injuries were sutured and stapled and four Penrose drains were placed. Exhibit A to Mr. Shannon's original Opposition contains

the photographs of Mr. Shannon's mutilated right arm. AER 94. The wound exposing Mr. Shannon's jugular vein extended into the mid-portion of the sternocleidomastoid muscle. AER 73-74, 96-107.

Despite suitable antibiotic coverage, Mr. Shannon developed a severe infection with muscle necrosis. Dr. Prutsok operated again, sharply debriding the brachioradialis, the extensor carpi radialis, the lengua brevia and the flexor digitorum superficialis in part. AER 100-01.

On July 14, 1991, Mr. Shannon underwent his third operation, under general anesthesia. A skin graft was harvested from Mr. Shannon's thigh and applied to Mr. Shannon's gaping right forearm and elbow wound. AER 102-04.

Although treated with physical therapy, Mr. Shannon's symptoms did not improve and in September, 1991, he saw Dr. Alan C. Ivar, Qualified Medical Examiner, State of California, for right-sided neck, ear and jaw pain, right-sided headaches in the occipital region, pain in the right hand, thumb and wrist with abnormal kinematics of the right forearm, weakened right hand grip and "constant nightly nightmares of being attacked by a dog." AER 105-07.

Dr. Ivar found, *inter alia*, diminished cervical range of motion with pain in all ranges of motion, hypesthesia in the right arm, anesthesia to the area of the skin graft, significant weakness of the right wrist flexors and extensors, and significantly diminished right hand grip strength. Dr. Ivar placed Mr. Shannon on temporary total disability and referred him for neurological examination to rule out nerve impairment. Dr. Ivar recommended that Mr. Shannon be evaluated by a psychiatrist for this nightmares and concluded that Mr. Shannon "will undoubtedly have

permanent residual disability with regards to grip strength, wrist and hand movements of the right upper extremity." AER 106-07.

A photograph of Mr. Shannon's open wound to his right arm, part of the record on appeal, is at Appendix D-1. A photograph of the scarring, also part of the record on appeal, is at Appendix D-2.

The use of the dog to find and attack Mr. Shannon was in conformity with the policy of Santa Ana Chief Walters, Santa Ana Canine Supervisor Luna, and the City of Santa Ana. AER 287-88. It was also in conformity with the policy of Costa Mesa Chief Snowden, and the City of Costa Mesa. AER 222-23. Costa Mesa Sgt. Santee said that the injuries to Mr. Shannon did not surprise him and that the entire incident, including Shannon's reaction to the dog, was a "textbook case." AER 562-63.

2. Craig Brooks.

At about 2:00 p.m. on June 25, 1991, a dazed and incoherent Craig Brooks, obviously intoxicated and injured, was arrested by Irvine police for traffic violations, driving under the influence of alcohol, and grand theft auto. AER 294. Mr. Brooks was transported by ambulance for emergency treatment and taken for x-rays. Mr. Brooks, barefoot and wearing only his shorts, walked out of the hospital, hid in a bush and passed out. AER 297, 348, 349, 350-51A. Santa Ana canine supervisor Luna and Santa Ana dog handlers Bertagna and Letizio showed up with dogs. The officers claim they gave Santa Ana's standard "canine announcement" three times, waited two minutes, and began searching for Mr. Brooks. Bertagna's dog alerted to a bush. Without giving any further announcement, warning or opportunity to surrender, Bertagna permitted his dog to go into the bush and attack Mr. Brooks. AER 290-91. Bertagna heard Mr. Brooks

screaming, AER 291, claimed that dog pulled Mr. Brooks out of the bush, biting him in the buttocks, and that Mr. Brooks was trying to make the dog stop biting him by hitting and pulling at the dog. Bertagna told Mr. Brooks to "stop fighting with the dog and put his hands out in plain view." When Mr. Brooks did put his hands out in plain view, Bertagna grabbed the dog by the collar and called him off. AER 291. Mr. Brooks testified the dog bit him for 13 to 15 seconds. AER 356-57 [Brooks depo].

Mr. Brooks sustained multiple lacerations to his left thigh and buttocks, and extreme, painful ecchymosis (bruising), requiring suturing, a course of intravenous (Ancef) and oral (Keflex) antibiotics for five days, a tetanus shot, and pain medication. The sutures were removed after eight days. Mr. Brooks was treated with dressing changes for 20 days and received medical treatment for approximately 30 days. Mr. Brooks sustained permanent scarring. AER 354-55 [Depo], AER 599, 605, 607, 608, 609 [med. records].

This attack on Mr. Brooks was in conformity with the policy of the City of Santa Ana and approved by respondent Chief Paul Walters. AER 292.

3. Other Evidence.

Petitioners submitted substantial evidence on the training of police dogs, injuries the dogs inflict, law enforcement standards for the use of force, including sworn testimony from a Who's Who list in law enforcement. The Panel does not acknowledge this evidence, let alone discuss it.

The Medical Evidence

To show the risk of serious injury from police dog attacks, petitioners relied on a board certified general surgeon with special qualifications in surgical critical care, Peter C. Meade, M.D., in opposing respondents' motions for summary judgment. AER 85-93. Dr. Meade studied injuries inflicted by police dogs, including medical records of over 200 persons, photographs of over 300 people, the medical literature including "the most significant study ever published on the nature and severity of injuries caused by police dogs," AER 86, K. Snyder & M. Pentecost's article, *Clinical and Angiographic Findings in Extremity Arterial Injuries Secondary to Dog Bites*, ANNALS EMERGENCY MED., Sept. 1990, videotapes of police dogs attacking people, police studies of injuries, and testimony of police dog trainers and handlers, including the trainer of respondents' dogs (Adlerhorst Kennel's David Reaver). AER 85-87, ¶¶ 3A-H. He concluded that police dog attacks create a substantial risk of causing serious bodily injury or death. AER 87, ¶ 4. This is because of the dogs' size and aggressiveness, their " 'bite, crush and lacerate' " training, AER 88, ¶ 4B, their training to bite "*anyplace* on the body, including such vital areas as the genitals, neck, head, axilla (interior upper arm), popliteal area (behind the knee), distal one third of the medial thigh (front thigh)," AER 88-89, ¶4D, because "trained attack dogs can exert more than 450 PSI with their jaws, a pressure great enough to penetrate light sheet metal," AER 88, ¶4C, because the dog's training encourages it to "drive its teeth as deeply into the person's body as possible," AER 88, ¶4C, and to "rebite," and because people naturally try to avoid the "considerable pain" and "attempt to break free of the bite by pulling his or her arm, leg, or other portion of the body out of the dog's mouth." AER 89, ¶ 4F.

The Evidence Of Police Standards And Its Application To This Case

Petitioners submitted the declaration of VanNess Bogardus, a retired Los Angeles County Deputy Sheriff. Mr. Bogardus was one of two pilot canine handlers for the Sheriff's Department and served as a dog handler and trainer from June 1980, to November, 1986. Mr. Bogardus trained canine units for the Sheriff's Department and many local police departments as well as foreign governments. AER 123, ¶ 2.

Police dogs, according to Mr. Bogardus, are trained to bite and rebite any part of the body, as hard and as long as possible, with the entire mouth rather than with just the front incisors. AER 125, ¶ 12. People bitten by the dogs become frightened and try to protect themselves. Dog handlers must expect a person to panic, lose control and do anything to make the dog stop. People defecate and urinate in terror of the dog's attack.

"It is especially dangerous" to attack a person under the influence of alcohol. A person is likely to lose control and not respond to "stop fighting" the dog. People under the influence of alcohol are likely to be more seriously injured. AER 127, ¶ 16.

Regarding the attack on Mr. Shannon, Bogardus opined that "Letizio used force against Mr. Shannon in violation of accepted standards for the use of force." "Officer Letizio used force which was capable of killing Mr. Shannon and created a substantial risk of inflicting serious physical injury yet Letizio did not have probable cause to believe that Mr. Shannon posed a credible and immediate threat of death or serious injury to Letizio or others when he released the dog. Mr. Shannon was suspected of non-violent traffic infractions or possibly (at most) a non-violent misdemeanor (Cal. Veh. Code § 2800.1). There are no facts in any

of the reports indicating that any officer suspected or believed that Mr. Shannon was armed with a weapon or was physically dangerous. . . . He did not have a weapon nor does any officer report facts indicating that Mr. Shannon had a weapon. There are no facts indicating that Mr. Shannon threatened anybody. Had he made such threats which were observed or known by the officers, they would have reported it. . . . " AER 127-28, ¶ 17.

Mr. Bogardus also concluded that "[w]hen officer Bertagna allowed his dog to attack Mr. Brooks, Bertagna used force against Mr. Brooks in violation of accepted standards for the use of force." "Officer Bertagna used force which was capable of killing Mr. Brooks and created a substantial risk of inflicting serious physical injury yet . . . Mr. Brooks was suspected of traffic violations, driving under the influence, leaving the scene of an accident, and possibly grand theft auto . . . all considered non-violent crimes. Furthermore, Mr. Brooks was known not to be armed since he escaped from custody after a search wearing only his undershorts. Finally, Mr. Brooks was known to be intoxicated. There is nothing in any report reflecting any facts to show that Mr. Brooks had armed himself, or that any officer saw or heard anything which would lead a reasonable officer to that Mr. Brooks was armed with a weapon or was physically dangerous. . . . No officer reports Mr. Brooks as making a threatening gestures of any type toward any person." "Had he made such threats which were observed or known by the officers, they would have reported it." AER 129, ¶ 21.

Petitioners also relied on other authorities supportive of the opinions of Dr. Meade and Mr. Bogardus. They included

California POST standards[2]; the testimony of Southern California law enforcement officials including Los Angeles County Sheriff Sherman Block, LAPD Chief Willie L. Williams, and former LAPD Chief Daryl Gates, AER 335-36, 410, 581-93; testimony of the man who trained respondents' dogs (Adlerhorst Kennel's David Reaver), AER 521-43; the Kindle videotape, AER 126 [¶ 14], AER 313-14; high quality photographs of a representative sample of injuries inflicted by Adlerhorst-trained police dogs AER 662 [¶3], 667-735; and authoritative texts, AER 642-51.

Ninth Circuit Decision.

The Panel held that all the individual police officers (Chiefs Walters and Snowden, officers Letizio, Luna, Fleet, McCarthy, Durham and Santee) were entitled to qualified immunity as a matter of law. The Panel relied on the Ninth Circuit's earlier decision in *Chew v. Gates*, 27 F.3d 1432, 1447-49 (9th Cir. 1994), in which a divided court held that while the City of Los Angeles' use of dogs to attack and bite suspects may be unconstitutional, Los Angeles Chief of Police Daryl Gates and other officers were entitled to qualified immunity because it was not clearly established that using *dogs* to attack and mutilate people violated the Fourth Amendment. A-2, A-3, A-5.

Turning to the liability of the municipalities, the Panel assumed there was sufficient evidence that the dog attacks were pursuant to municipal policy. A-3, A-6 & n.2. Nevertheless, the

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[2] POST is the California Commission on Peace Officer Standards and Training, operated by the California Department of Justice. Cal. Penal Code § 13500. POST promulgates rules establishing minimum standards for the training of police officers. Cal. Penal Code § 13510. Police agencies that accept funding from POST must adhere to POST minimum standards. Cal. Penal Code § 13522.

Panel rejected petitioner Brooks' claim because, according to the Panel, "Brooks has not alleged a constitutional basis for his section 1983 claim." A-4, A-5. The Panel noted that neither *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), nor *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), resolved whether the Fourth Amendment applies to individuals like Mr. Brooks, *i.e.*, someone who was injured by police action *after* his arrest. Hence, the Panel contended Mr. Brooks did not carry his burden to demonstrate a Fourth Amendment violation. A-5.

As to petitioner Shannon, the Panel concluded that there was no constitutional violation because the officers were entitled, as a matter of law, to kill Mr. Shannon, *i.e.*, to use deadly force. "Shannon . . . was seen by police speeding and running red lights at 4:30 a.m., pulled up onto the lawn of a restaurant and fled from police on foot, climbing five fences (including three at the top), to hide in oleander bushes in the backyard of a house in a residential area." The Panel also claimed (incorrectly) that the dog handler Letizio "was told that Shannon had prior arrests for armed robbery."[3] A-7. Consequently, even though there were no fact upon which to believe Mr. Shannon was armed or dangerous, and

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[3] The Panel stated that the dog handler Letizio was informed that Mr. Shannon had had multiple arrests for armed robbery. A*. In his police report, however, Letizio referred to only <u>one</u> arrest for armed robbery. AER 172 (third paragraph). The Costs Mesa arrest package, the source of the information regarding Mr. Shannon that was broadcast, reflected only one prior arrest on an armed robbery charge. AER 219-20 (¶¶4-9).

The prior arrest for armed robbery was more than one year before the dog attack and concerned a robbery occurring more than two years before the June *, 1991 dog attack. The respondent officers had no information on the arrest's disposition (Mr. Shannon was released and never charged with any crime).

even though he was sought on traffic infractions only (speeding and running a red light), the prior arrest for armed robbery on May 31, 1989, meant that Mr. Shannon constituted an immediate threat of serious injury or death on June 29, 1991, the date of the dog attack. AER 219 at ¶6.

REASONS FOR GRANTING THE WRIT

1. The Court Should Hold That Police Officials Who Knowingly Use Weapons, *i.e.*, Attack Dogs, To Injure People Are Not Entitled To Qualified Immunity Merely Because The Courts Have Not Previously Held That The Serious Injuries Which Police Officials Know Or Should Know The Dogs Inflict, Are Serious Injuries.

In *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), this Court left open the question of the proper application, in an excessive force case, of qualified immunity. 490 U.S. at 399 n.12. The Court should grant review to resolve this critical question. Lower courts have been divided on whether, in an excessive force case, qualified immunity can be distinguished from a defense on the merits. *Compare Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994) (recognizing qualified immunity as a separate defense from the inquiry on the merits) *with Hopkins v. Andaya*, 958 F.2d 881, 885 n.3 (9th Cir. 1992) (holding that in excessive force cases, qualified immunity is the same inquiry as liability on the merits); *Street v. Parham*, 929 F.2d 537, 540 (10th Cir. 1991) (same).

Under the Ninth Circuit's decision in *Chew*, officials are encouraged to feign ignorance. Police officials are not liable for dog attacks because no *court* has ever told them that the dogs are likely to cause serious injury. 27 F.3d at 1446-47. Public officials, including police, have no claim to more specific "notice" of what

a deadly weapon is than ordinary citizens *charged with crimes*. No one *criminally charged* would get away with siccing a trained attack animal on another person by complaining that no *case* had previously held such attacks to be an assault with a deadly weapon,[4] even though the Constitution specially guarantees the criminally accused "fair notice that his contemplated conduct is forbidden." *United States v. Harriss*, 347 U.S. 612, 617, 74 S. Ct. 808 (1954). Every citizen is required to exercise a modicum of sound judgment. Public officials, especially the police, because of their training, experience and position, are no exception.

When respondents let the dogs attack petitioners, it was clearly established that the Fourth Amendment governed all seizures of free citizens by the police. *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). *Any* force used was governed by *Graham v. Connor's* objective reasonableness standard. It was also clearly established by decisions of both this Court and lower courts that seizure by any means, including a police-sanctioned dog attack, was a "seizure" under the Fourth Amendment. *Brower v. County of Inyo*, 489 U.S. 593, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989) (police roadblock is Fourth Amendment seizure); *Kerr v. City of West Palm Beach*, 875 F.2d 1546 (11th Cir. 1989) (City of West Palm Beach policy permitting dogs to attack suspects violates Fourth Amendment);

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[4] *People v. Nealis*, 232 Cal. App. 3d Supp. 1, 3, 283 Cal. Rptr. 376, 378 (1991) (dog is deadly weapon); *State v. Sinks*, 168 Wis.2d 245, 483 N.W.2d 286, 289-90 (Wis. Ct. App. 1992) (Court holds that doberman pinscher is "likely to produce death or serious bodily harm" because "[i]t is common knowledge that dogs can inflict severe injury and can be instructed to attack."); *State v. Bowers*, 239 Kan. 417, 721 P.2d 268, 273-275 (1986). Indeed, just permitting a large dog to "lunge, jump and chomp at" a person at close range, is assault with a deadly weapon. *Michael v. State*, 160 Ga. App. 48, 286 S.E.2d 314 (1981).

Robinette v. Barnes, 854 F.2d 909 (6th Cir. 1988) (police dog attack analyzed under Fourth Amendment); *Marley v. City of Allentown*, 774 F. Supp. 343, 346 (E.D. Penn. 1991), *aff'd without opn.*, 961 F.2d 1567 (3rd Cir. 1992) (police dog attack may be considered "deadly force" under *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)). Furthermore, in 1985 this Court, in *Tennessee v. Garner*, clearly established that the police may not use deadly force to seize a person unless there exists probable cause that the suspect presents an immediate threat of death or serious injury. 471 U.S. at 11-12.

Qualified immunity should not be available. "In Fourth Amendment unreasonable force cases, unlike in other cases, the qualified immunity inquiry is the same as the inquiry made on the merits." *Hopkins v. Andaya*, 958 F.2d 881, 885 n.3 (9th Cir. 1992); *see also Street v. Parham*, 929 F.2d 537, 540 (10th Cir. 1991) ("determination of liability and the availability of qualified immunity depend on the same findings").

The Ninth Circuit's conclusion, in *Chew*, that police officers are entitled to immunity because there was no case holding that using dogs to attack people may violate the Fourth Amendment, is wrong. The courts' function is to determine the legal standards. Once those standards are clearly established, it is the responsibility of the police to recognize the facts that trigger the appropriate legal standard. The police cannot and should not rely upon appellate courts to engage in fact-finding missions in order to inform the police on an instrumentality's capacity to cause serious injury or death. This is particularly true here. Respondents, not the courts, have the first-hand knowledge of the capacity of police dogs to cause serious injury or death. Public officials should not reap the benefits of qualified immunity when they feign ignorance of obvious facts or bury their heads in the sand. *Little v. Walker*, .552 F.2d 193, 197 (7th Cir. 1977) ("official may not take solace

in ostracism").

This Court has long held that the reasonableness of a seizure will depend on its intrusiveness, and that intrusiveness is measured principally by the injuries likely to be inflicted. Therefore, it makes no difference whether those injuries are inflicted by guns, cars, knives, clubs, chokeholds, dogs, mountain lions or rattlesnakes. For police officials to argue that they can not be held responsible for the injuries *dogs* inflict because no *court* has ever told them that they will be held liable, is evidence of their irresponsibility. It brings to mind the admonition that "[i]t would create perverse incentives indeed if a qualified immunity defense could succeed against those types of claims that have not previously arisen because the behavior alleged is so egregious that no like case is on the books." *McDonald v. Haskins*, 966 F.2d 292, 295 (7th Cir. 1992).

Notwithstanding the foregoing, there may be an exception. In cases like this one where a lower level public employee, *e.g.*, a patrolman in a police paramilitary organization, is following the orders of superior officers, it may be both fair and prudent to recognize the existence of a narrowly limited "superior orders" "defense."[5] Organizations, especially paramilitary organizations, depend on subordinates' following orders. There is a difference in function, experience and responsibility between supervisors who give orders and subordinates who are expected, trained and paid to carry them out. Police chiefs should be more attuned to what is "clearly established law" and expected to exercise better judgment than lower level subordinates. The primary responsibility for bad policy decisions should not fall on the least culpable, the person at the low end of the chain of command.

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[5] Where the word "defense" is used in quotation marks, it refers to qualified immunity.

Of course, "superior orders" may *not* legitimately be considered a factor in determining whether force is constitutionally reasonable. Giving any weight at all to orders approving the use of force is antithetical to the basic structure of Fourth Amendment jurisprudence. It is inconsistent with this Court's mandate that Fourth Amendment seizures be judged "objectively," and creates a "Catch-22" that virtually eliminates any chance that a jury will ever find anyone, much less a responsible public entity or supervisor, liable for constitutional violations committed pursuant to an official policy or practice.

Graham v. Connor held that "the 'reasonableness' standard is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, *without regard to their underlying intent or motivation.*" *Id.* 490 U.S. at 397 (emphasis added). Reaffirming *Tennessee v. Garner, supra*, the Court restated the general rule that "[d]etermining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of " 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' " against the countervailing governmental interests at stake." *Graham v. Connor, supra,* 490 U.S. at 396. The particular factors to be considered include the "severity of the crime," whether the suspect "poses an immediate threat to the safety of the officers or others," and whether he is "actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396.

Absent from the foregoing analysis of objective reasonableness in is *any* factor which could reasonably be equated with "following orders." As a result, under the "objective reasonableness" standard, the Fourth Amendment should afford the same protections in Alabama and Arizona, Boyle Heights and Brentwood, regardless of the good or bad training an individual

officer has received. The Court's determination that only "objectively" reasonable force may be used requires the utilization of standards independent of the training of a particular officer and the policies and practices of a particular unit or department. For example, that an officer has been instructed to shoot all fleeing felons, regardless of risk, should not be admissible as evidence that it was "objectively reasonable" for that officer to shoot an unarmed fleeing felon in violation of *Tennessee v. Garner*. Thus, the question is not whether a particular officer acted reasonably in following the particular training he or she was given by superiors; it is whether the force used was reasonable. In short, the value of lower-ranking police following superiors' orders has never been recognized as a basis for upholding the constitutionality of police action which infringes on an individual's Fourth Amendment interests.

But as a practical matter officers enjoy a *de facto* "following orders" "defense." "[J]urors' general sense of fairness mitigates against blaming an officer for causing a constitutional injury when he merely carried out department policy as an obedient employee." Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 HAST. L.J. 499, 548 (1993). Even United States Nuremberg Chief of Counsel for War Crimes, General Telford Tyler, believed that "Article 8 of the Charter, providing that obedience to a superior's command to commit a crime should be considered only in mitigation . . . is flawed. If the defendant did not know, and had no basis for knowing, that the order he had obeyed was unlawful, the defendant should not be held liable at all." Telford Taylor, *The Anatomy of the Nuremberg Trial* 630 (1992). Moreover, the jury may believe the "absent tort-feasor [the employer or supervisor] the wrongdoer." 9 Wright & Miller, *Federal Practice and Procedure*, note 182, § 2388, at 293 (1972). "In this situation, a jury that believes that the plaintiff suffered a

constitutional injury would likely sympathize with the plight of the individual officer and find in her favor, believing that the municipality would be held accountable for the unlawful practice it maintained." Colbert, *supra*, 44 HAST. L.J. at 543. Therefore, recognizing "superior orders" as an "extraordinary circumstance," *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), justifying qualified immunity would merely reflect reality.

A subordinate officer like petitioners Letizio and Bertana, the dog handlers, should not, though, enjoy immunity merely because they followed orders. As the Nuremberg experience exemplifies, the immunity must be narrow. While the dog handlers are certainly less culpable than the chiefs of police (Walters and Snowden), they are not without fault. The dog handlers should have known, despite their superiors' approvals, that what they were doing was wrong. The use of dogs to attack people is premised on the factually untrue assumption that they are not reasonably capable of inflicting serious injury or death. The dog handlers must have know better. They trained with the dogs, used the dogs, and must have saw what they did. Given the handlers' first hand experience, they had to realize the severity of the injuries the animal would likely inflict. That they were told that a police dog was not likely to inflict serious injuries when it attacked did not permit the handlers to ignore what they knew to be the truth from they own experience.

The factual question upon which handlers' entitlement to immunity should hinge is whether they knew. If they did not know and were merely following orders in ignorance, they should be entitled to qualified immunity. On the record presented to the trial court, however, that question can not be resolved in the handlers' favor. The handlers' motions for summary judgment should have been denied.

2. The Court Should Grant Review To Resolve A Conflict Among The Circuits On Whether *Graham v. Connor* Applies To Pretrial Arrestees.

Well before the dog attack, petitioner Brooks had been arrested and placed in police custody. The Panel decision correctly noted that this Court has not decided whether the Fourth Amendment applies to pretrial arrestees. A-4. Lower courts are divided. In *Hammer v. Gross*, 932 F.2d 842 (9th Cir. 1991) (en banc), the Ninth Circuit held that as to a pretrial detainee who alleged that police officers used excessive force in extracting blood, "the right in issue arises under the Fourth Amendment." 932 F.2d at 845. Similarly, the Second and Tenth Circuits hold that the *Graham* test applies in the period between the initial arrest and the initial court appearance. *Frohmader v. Wayne*, 958 F.2d 1024 (10th Cir. 1992); *Powell v. Gardner*, 891 F.2d 1039 (2nd Cir. 1989). But the Fifth and Seventh Circuits disagree, holding that a person claiming excessive force while in custody but before conviction must show a violation of his Eighth Amendment rights. *Rankin v. Klevenhagen*, 5 F.3d 103, 105-06 (5th Cir. 1993); *Wilkins v. May*, 872 F.2d 190 (7th Cir. 1989) (In the period between arrest and detention, a substantive due process analysis governs). Thus, continued controversy may be expected until this Court settles the point.

3. This Court Should Decide Whether, Under The Fourth Amendment, A Person Lawfully Arrested Retains His Right Of Self-Defense Against Excessive Force.

Both Thomas Shannon and Craig Brooks tried to stop the dogs' initial attacks by fending off and striking the dog. Petitioners' injuries (particularly those of Mr. Shannon) were probably aggravated by their unsuccessful efforts to defend against the dogs' attacks. Respondents seized upon these facts to blame petitioners for their injuries, arguing that they should have become passive when attacked instead of "fighting with the dog." At least one district court employed similar reasoning in concluding that police officers committed no constitutional violation when they use a police dog to attack a robbery suspect. *Kopf v. Wing*, 942 F.2d 265, 268 (4th Cir. 1991) ("The [district] court faulted Casella for fighting with the dog rather than surrendering.").

This Court has never decided whether a person has a constitutional right of self-defense against excessive force. The issue, though, is important. The natural reaction of *anyone* -- even "suspects" -- will be to protect oneself from the dog's attack:

> Upon being bitten by a dog, a suspect usually attempts to free himself; the dog, however, is trained to maintain his hold on the suspect until ordered to release the suspect by its handler. Thus, if a dog should lose his hold as a result of the suspect's attempts to free himself, the dog will seek to reestablish it. As a result, suspects often suffer serious injury from multiple bites received during the course of an apprehension.
> *Kerr v. City of West Palm Beach*, 875 F.2d 1546, 1550 (11th Cir. 1989).

Thus, anytime a police dog attacks the person will probably try to defend himself. *Chew v. Gates*, 27 F.3d 1432, 1441 n.7 (9th Cir. 1994) ("Given the violent nature of [the dog's] attack on Chew, and considering the fact that [the police dog] was still engaged in biting him when the officers came upon the scene, it is not surprising that Chew was responding by hitting the dog with a metal pipe."); *Kopf v. Wing*, 942 F.2d 265, 268 (4th Cir. 1991) (Fourth Circuit held that a "jury could find it objectively unreasonable to require someone to put his hands up and calmly surrender while a police dog bites his scrotum.").

The Fourth Amendment *should* guarantee a person's right to defend himself from invasive and unreasonable mutilations like those caused by dog attacks. "[T]he integrity of an individual's person is a cherished value of our society." *Schmerber v. California*, 384 U.S. 757, 772, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)). "A crucial factor in analyzing the magnitude of the intrusion . . . is the extent to which the procedure may threaten the safety or health of the individual." *Winston v. Lee*, 470 U.S. 753, 761, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985). Consequently, "the Fourth Amendment's command that searches be 'reasonable' requires that when the State seeks to intrude upon an area in which our society recognizes a significantly heightened privacy interest, a more substantial justification is required to make the search 'reasonable.' " *Winston v. Lee*, *supra*, 470 U.S. at 767. No wonder that the "nature and quality of the intrusion," *Graham v. Connor*, *supra*, 490 U.S. at 386, is at the heart of the protection afforded by the Fourth Amendment.

California law, consistent with that in other jurisdictions, has long recognized the rule that suspects, even though lawfully arrested, retain their right of self defense as to any excessive force. *People v. Curtis*, 70 Cal. 2d 347, 357, 74 Cal. Rptr. 713, 719, 450 P.2d 33 (1969) (California Supreme Court holds that a suspect,

even though he is lawfully under arrest, may still "use reasonable force to defend life and limb against excessive force.").

The same rule ought to apply under the Fourth Amendment. Large, aggressive animals terrify people.[6] ASER 586-87, ¶¶15, 16. Permitting a police dog to attack a person may be "subhuman and vicarious animalism," *Miller v. United States*, 404 F.2d 611, 612 (5th Cir. 1968), because animal attacks evoke primal fear. Afraid of being eaten, people become hysterical. Thus, a police officer should expect that a person may try to defend himself from the dog's attack. After all, whether armed with gun, dog or club, the identity of its user will have no relationship to the injuries inflicted. The bodily tissues which are penetrated, ripped or destroyed, know not whether the dog was the "Hound of the Baskervilles" or a "trained police dog." Infection is infection; damaged arteries are damaged arteries; pain is pain.

4. The Court Should Grant Review And Hold That The Reasonableness of Police Seizures May Not Be Adjudicated In A Vacuum, But Must Be Considered In Light Of Evidence Of Their Actual Reasonableness, Including Evidence From Police Practices Experts Regarding Law Enforcement Standards.

This case raises a primary question: what information should the courts consider in deciding the "reasonableness" of police conduct? Petitioners offered substantial evidence that the dog attacks violated police use of force standards, including the police standard on lethal force. *See, e.g.*, AER 76-77 [¶¶10-11];

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[6] It is this quality which makes dogs a useful police tool. "Nothing 'cools' a potentially violent situation more quickly than the sight of police canine." INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, TRAINING KEY # 238, *Police Dogs*, ASER 260.

AER 115-16 [P.O.S.T. standards]; AER 125 [¶¶10, 11], 127-29 [¶¶17-18, 21-22]. The Panel, after briefing mentioning the Meade and Bogardus declarations, stated simply that they were "insufficient to withstand summary judgment." A-10. There was no further discussion.

The Panel should not have blithely disregarded the expert declarations. Actual *evidence*, including the knowledge and experience of qualified law enforcement professionals, may be offered and should be considered in deciding how law enforcement professionals should act. Neither juries nor judges necessarily possess, as a matter of law, all of the information relevant to determining disputes involving the reasonableness of police actions. Just like medicine, engineering, auto mechanics, or any other field, law enforcement is a profession involving a substantial degree of specialized education, training and experience which is not common knowledge. The reality of police work is not necessarily reflected in "Dragnet," "Hill Street Blues," or "Cops." People go to police academies to be trained to be police officers. The State of California sets standards -- P.O.S.T.[7] -- for the training of law enforcement officers. Law enforcement professionals frequently give expert opinion testimony about the conduct of other law enforcement professionals. Although, due to the selection process, many judicial officers come from prosecutorial backgrounds, this does not necessarily qualify all judges to determine the reasonableness of police actions, without reference to any evidence, including evidence from law enforcement

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[7] According to Cal. Penal Code § 13510, California POST "shall adopt, and may from time to time amend, rules establishing minimum standards for training of city police officers." Under California law, any law enforcement agency that receives funding from POST must certify that the agency "will adhere to the standards for recruitment and training established by the commission." Cal. Penal Code § 13522.

professionals.

In *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), this Court observed that "Actual departmental policies are important" in determining what is " 'unreasonable' " under the Fourth Amendment. 471 U.S. at 19. Reasonableness should be "viewed in light of the policies adopted by the police departments themselves." 471 U.S. at 18. Police conduct which violates state standards is not reasonable. *Reed v. Hoy*, 909 F.2d 324, 330 n.5 (9th Cir. 1989) (Police action that violates state law standards may be unreasonable under the Fourth Amendment.)

Had petitioners' evidence been offered to a jury to support their claims, the jury could rely upon it. F.R.E. Rules 702, 703, 704; *Davis v. Mason County*, 927 F.2d 1473, 1484-85 (9th Cir. 1991); *Cabrales v. County of Los Angeles*, 864 F.2d 1454, 1460 (9th Cir. 1988); *Zuchel v. City and County of Denver, Colo.*, 997 F.2d 730, 742-43 (10th Cir. 1993). Indeed, the Fourth Circuit *reversed* the trial court for precluding plaintiff from calling police practices experts in a police dog bite case to show that the officers violated police standards. *Kopf v. Skyrm*, 993 F.2d 374, 379 (4th Cir. 1993). The Panel's refusal in this case to even acknowledge plaintiffs' evidence is inexcusable.

Since the decision in *Graham*, *all* uses of force must be analyzed "objectively." Therefore, the question is *not*, does the defendant before the court believe he acted properly but rather, would an objectively reasonable officer so believe. Absent expert testimony on standards within law enforcement and their application to the case at hand, it may be impossible for a plaintiff to challenge a defendant officer's self-serving claim that his actions were objectively reasonable.

Police dog bite litigation in the Central District of

California epitomizes this problem. Thousands of people have been needlessly mutilated,[8] often sadistically,[9] by police dogs. Handlers have been instructed that siccing a "trained" 85-pound German Shepherd on a human being is okay because it will probably reduce the level of violence and is not likely to inflict

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[8] *See generally*, G. M. Bush, *Litigation Over Police-Dog Attacks Gains Some Bite*, Los Angeles Daily Journal, Nov. 26, 1990, at 1.

[9] The sadistic use of dogs to brutalize people has a long, bloody history. The European conquerors used dogs extensively to exterminate the peoples of the New World. J.G. and J.J. Varner, *Dogs of the Conquest* (U. Oklahoma Press 1983). As reported in *Moran v. Davis*, 18 Ga. 722 (1855), in 1852 the State of Georgia found it necessary to specifically prohibit owners, hirers and overseers of slaves from "unnecessarily biting or tearing [slaves] with dogs." *Id.* at 724. A war crimes tribunal tried and hanged Confederate Captain Henry Wirz for his use of dogs to mutilate escaped prisoners. N.P. Chipman, *The Tragedy of Andersonville, Trial of Captain Henry Wirz -- The Prison Keeper* (1911) at 410-412, *reprinted as The Andersonville Prison Trial* (1990) ("The tracking hounds would have been sufficient to discover the prisoners, and as they are usually harmless, would have served the purpose of the pursuer and at the same time inflicted no injury upon the pursued.") The Nazi extermination camp Treblinka is remembered in the nightmares of its few survivors not just for its gas chambers. Addicted to the infliction of human suffering, guards deployed Kommandant Franz Stangl's dog "Bari" "to attack people, and specifically their genital regions, on command" as they were herded naked down the chute to their doom at the hands of "Ivan the Terrible." Sereny, *Into That Darkness* -- An Examination of Conscience 202 (1974). *See also Miller v. United States*, 404 F.2d 611, 612 (5th Cir. 1968), wherein the Fifth Circuit affirmed the criminal conviction of two deputies for causing a police dog to attack a prisoner to extract a confession. The court described the deputies' conduct as "subhuman and vicarious animalism."

serious injuries.[10] The evidence is overwhelmingly the opposite. Dogs regularly inflict serious injuries[11] and *provoke* needless violence. Yet the courts, ignorant of reality and apparently relying on "Lassie" reruns and wishful thinking, are unwilling to consider any evidence in conflict with their erroneous preconceptions. But without considering the evidence, in particular properly qualified expert testimony, the problem will continue. The constitutionality of the policy may never be tested. Unconstitutional policies will go unchecked. Civil unrest may result.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

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DONALD W. COOK
Attorneys for Petitioners

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[10] The consequences of permitting officers to use force is that it will be used. The uninitiated have no conception of the forces which motivate police to hurt people. *See* Jerome H. Skolnick, James J. Fyfe, *Above the Law, Police and the Excessive Use of Force*, 10-11 (1993); Paul Chevigny, *Police Power: Police Abuses in New York City*, 136 (1969).

[11] *See, e.g.*, K. Snyder's & M. Pentecost, *Clinical and Angiographic Findings in Extremity Arterial Injuries Secondary to Dog Bites*, ANNALS EMERGENCY MED., Sept. 1990 (Doctors at County-USC Medical Center conclude that police dogs frequently inflict serious injuries).

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 93-56542
D.C. No. CV-92-00533-LHM (C
MEMORANDUM*

FILED
FEB 3 1995
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

THOMAS SHANNON; CRAIG BROOKS,

Plaintiffs-Appellees,

v.

CITY OF COSTA MESA; CITY OF SANTA ANA; PAUL WALTERS, Chief of Police of the Santa Ana Police Department; RAUL LUNA; MICHAEL FLEET; ANTHONY BERTAGNA; WILLIAM LETIZIO; DAVE SNOWDEN; PAUL MCCARTHY; ROBERT DURHAM; BURTON SANTEE,

Defendants-Appellees

Appeal from the United States District Court
for the Central District of California
Linda H. McLaughlin, District Judge, Presiding

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Argued August 3, 1994
Pasadena, California
Submission Deferred August 3, 1994
Resubmitted January 5, 1995

Before: O'SCANNLAIN and T.G. NELSON, Circuit Judges, and MERHIGE,** District Judge

The parties are familiar with the facts, so we need not recite them here. This appeal involves two separate cases, essentially treated by Thomas Shannon and Craig Brooks as a single case despite a district court ordering the two cases severed. The alleged civil rights violations of the two plaintiffs involved different facts, circumstances, and incidents which occurred on two different days. Santa Ana police officers were involved in both cases. Costa Mesa police officers were involved in only the Shannon case.

Brooks

Officers Bertagna, Fleet, and Luna are entitled to qualified immunity. At the time of this incident, the law was not clearly established such that reasonable officers would have known that their actions in deploying a dog and assisting in the canine search for a felony hit-and-run arrestee, who escaped from custody while at a hospital and hid in foliage near a construction zone, violated a clearly established right. See Chew v. Gates, 27 F.3d 1432, 1447-49 (9th Cir. 1994), petition for cert. filed, 63 U.S.L.W. 3463 (U.S. Nov. 28, 1994) (No. 94-980); see also Mitchell v. Forsyth, 472 U.S. 511, 528, 535 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Brooks has not alleged the type of

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** Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

circumstances or conduct involving use of a police dog that would violate clearly established law. See Chew, 27 F.3d at 1448-49 (citing Mendoza v. Block, 27 F.3d 1357, 1362 (9th Cir. 1994) (giving example of officer siccing dog on handcuffed arrestee)).

Santa Ana Police Chief Walters is also entitled to qualified immunity. See Chew, 27 F.3d at 1446-50. Chew evaluated the issue of qualified immunity under the assumption that the "departmental policy authorized the use against all concealed suspects of dogs trained to search for and apprehend persons by biting and seizing them." Id. at 1446. In this case, Brooks was not just a concealed suspect; he was an escaped and concealed arrestee.

The City of Santa Ana, of course, would not be entitled to a qualified immunity defense. Chew, 27 F.3d at 1439. To prevail on a claim against the City of Santa Ana, Brooks mush show: (1) the officers violated his constitutional rights, and (2) the City's policy caused the violation. Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 690-92 (1978). Even assuming sufficient evidence of the actual municipal policy at issue here,[1] Brooks has not demonstrated that he was deprived of federally protected rights. See 42 U.S. C. § 1983. He contends that

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1 A copy of the Santa Ana Canine Policy was included in plaintiffs' belatedly filed "Index and Excerpts of Testimony and Relevant Reports in Opposition to Motion for Summary Judgment." The district court refused to consider these belatedly filed documents. The court's refusal to consider these documents is "not specifically and distinctly raised and argued" in the opening brief, and will therefore not be considered on appeal. Officers for Justice v. Civil Serv. Comm'n, 979 F.2d 721, 726 (9th Cir. 1992), cert. denied, 113 S. Ct. 1645 (1993).

his Fourth Amendment rights have been violated and that he was not afforded the constitutional protections necessary under Graham v. Connor, 490 U.S. 386 (1989), and Tennessee v. Garner, 471 U.S. 1 (1985).

However, neither of these cases resolved the question of "whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins." Graham, 490 U.S. at 396 n.10. Graham applies to claims "aris[ing] in the context of an arrest or investigatory stop of a free citizen." Id. at 394 (emphasis added); see also id. at 395 n.10. In Garner, police shot and killed a suspect who did not appear to be armed to prevent his escape from the scene of a burglary. 471 U.S. at 4. The use of the dog occurred in this case after Brooks had been arrested, after he escaped from police custody in the hospital, but prior to pretrial detention. Brooks has not alleged that he was subjected to excessive force amounting to punishment. See Graham, 490 U.S. at 395 n. 10. Nor has he made any argument that addresses the factual distinction between his case and the prearrest situations in Graham and Garner.

"[Section] 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred." Graham, 490 U.S. at 393-94 (internal quotations omitted). The Fourth Amendment analyses in Graham and Garner do not confer federal rights on Brooks, an escaped felony arrestee, that can serve as a basis for Monell liability. Compare Chew, 27 F.3d at 1439-43; cf. Robins v. Harum, 773 F.2d 1004, 1009-10 (9th Cir. 1985) (a pre-Graham case which held that excessive force by law enforcement official in the course of transporting an arrestee gives rise to a section 1983 claim based upon a Fourth Amendment violation).

Brooks has not alleged a constitutional basis for his section 1983 claim. There is no basis, therefore, for the imposition of Monell liability on the City of Santa Ana. See Monell, 436 U.S. at 690-92; see also Los Angeles v. Heller, 475 U.S. 796, 799 (1986) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point.").

The district court properly granted summary judgment in favor of Officers Bertagna, Fleet, Luna, Chief Richardson and the City of Santa Ana.

Shannon

Even if the district court erred in granting summary judgment to Santa Ana Officers Letizio and Luna "without notice," because the notice of motion was amended to name the individual officers after Shannon had filed his opposition papers, we affirm the order. Officer Luna, who is in charge of the Santa Ana canine program, and who is alleged in Shannon's complaint to have been involved in adopting the policy, is entitled to qualified immunity just as was Captain McKinley in Chew, who had overall supervisory responsibility for the L.A.P.D. canine program. Chew, 27 F.3d at 1446. Officer Letizio, the canine handler, is entitled to qualified immunity because the law governing his conduct was not clearly established at the time of Shannon's arrest. Id. at 1447-50. Shannon has not alleged the type of circumstances or conduct that would violate clearly established law. See Chew, 27 F.3d at 1448-49. We note that although the district court granted summary judgment to Officers Fleet and Bertagna as well, these officers were not named in Shannon's Third Amended Complaint.

Santa Ana Police Chief Walters is immune from suit under the qualified immunity doctrine. Chew, 27 F.3d at

1446-50. This leaves the question of the liability of the City of Santa Ana. Even assuming adequate evidence of the actual policy at issue in this case,[2] application of the Graham factors supported the decision to use canine force to arrest Shannon. Cf. Chew, 27 F.3d at 1441-43.

In determining whether the use of force to effect a seizure is reasonable, "the nature and quality of the intrusion on the individual's interests" must be balanced against "the countervailing government interests at stake." Graham, 490 U.S. at 396 (internal quotation omitted); see also Chew, 27 F.3d at 1440. Three factors are considered in weighing the governmental interests involved: (1) "the severity of the crime at issue," (2) "whether the suspect poses an immediate threat to the safety of the officers or others," and (3) "whether he is actively resisting arrest or attempting to evade arrest by flight." Graham, 490 U.S. at 396 (citing Garner, 471 U.S. at 8-9).

These factors "are not to be considered in a vacuum but only in relation to the amount of force used to effect a particular seizure." Chew, 27 F.3d at 1441. In Chew, we considered but did not decide whether the use of dogs trained to bite and seize amounts to deadly force. Id. at 1435, 1442. If such use does amount to deadly force, it might be unconstitutional to employ dogs in circumstances like those in Garner. 471 U.S. at 3; see also Chew, 27 F.3d at 1452-53 (Norris, J., concurring in part and dissenting in part). The

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[2] See n.1, supra. Shannon also points out that in response to requests for admission, the City of Costa Mesa stated that the use of the dog to find and bite him was in accordance with the policies and practices of the City of Costa Mesa Police Department and pursuant to the authorization and directives of Costa Mesa Police Chief Snowden and Santa Ana Police Chief Walters.

facts before us, however, are unlike those of Garner or Graham.

Shannon, who was seen by police speeding and running red lights at 4:30 a.m., pulled up onto the lawn of a restaurant and fled from police on foot, climbing five fences (including three that were between six and eight feet high and one that was barbed at the top), to hide in oleander bushes in the backyard of a house in a residential area. Construing the evidence in the light most favorable to Shannon, Santa Ana Officer Letizio was not informed about the outstanding warrants, or the nature of the warrants. However, the record reveals that it was undisputed that Letizio was told that Shannon had prior arrests for armed robbery. The Declaration of Robert Mann, relied upon for the assertion that this fact was disputed, speaks to Letizio's alleged knowledge of the warrants, not the armed robbery arrests.

"Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." Garner, 471 U.S. at 11. Even assuming that the use of dogs trained to bite and seize constitutes the use of deadly force, we hold that the use of the dog in this case, by officers wishing to prevent harm to themselves and residents in the area, was objectively reasonable.

Review of the Graham factors leads to the same conclusion. The most important element, "whether the suspect poses an immediate threat to the safety of the officers or others," Chew, 27 F.3d at 1441, weighs against Shannon. Although Shannon, like Chew, was initially stopped for a traffic violation, Chew stopped for police, produced his driver's license, and spoke with police before his flight. Id. at 1442. As described above, Shannon's situation was different. Furthermore, Shannon hid in a residential

backyard, not a commercial junkyard. The safety of residents of the area also had to be considered. Unlike the situation in Chew, there is no material fact question about the immediate safety threat posed by Shannon. Compare id.

The other two Graham factors also weigh in favor of the government. As in Chew, an edge goes to the government on whether Shannon was "actively resisting arrest" when he hid in the bushes and did not come out after a canine announcement. See id. When looked at in isolation, the severity of the crime (speeding and running red lights) seems somewhat minimal. However, there was also Shannon's immediate and somewhat elaborate flight, as well as the information given to Letizio that Shannon had been arrested for armed robbery.

We conclude that in Shannon's case it is appropriate to determine as a matter of law that it was reasonable for Officer Letizio to release the dog. Accordingly, there is no basis for Monell liability to be imposed upon the City of Santa Ana. Monell, 436 U.S. at 690-92; Heller, 475 U.S. at 799. The district court's grant of summary judgment to the City of Santa Ana is affirmed.

Shannon filed his opposition to the summary judgment motion of the Costa Mesa defendants three days late. The district court granted the summary judgment motion on the ground that Shannon filed no opposition. Summary judgment is not an acceptable sanction for failure to abide by a local rule. Marshall v. Gates, No. 93-55022, slip op. at 105-06 (9th Cir. Jan. 4, 1995). However, unlike Chief Gates' papers in Marshall, the Costa Mesa defendants met their burden of demonstrating an absence of genuine issues for trial. Id. at 106. We therefore affirm the grant of summary judgment to the Costa Mesa defendants.

Costa Mesa Police Sergeant Santee, who requested a Santa Ana canine officer and who Shannon also contends had

a duty to intervene in the dog attack, is entitled to qualified immunity. The law governing his conduct was not clearly established at the time of Shannon's arrest. Chew, 27 F.3d at 1447-50. Officer McCarthy, who initially followed Shannon on foot and who Shannon contends had a duty to intervene in the dog attack, is also entitled to qualified immunity. Id.

To the extent that Shannon alleges that Sergeant Durham authorized, caused and/or permitted the use of the dog, he is entitled to qualified immunity. Id. Shannon also predicated Durham's liability on his alleged fabrication of Shannon's criminal history and the broadcast of this information to the officers in the field. However, while Shannon's opposition attempted to set forth many factual questions concerning Shannon's "arrest package," it failed to support the fabrication claim, or the claim that Shannon's prior history was unknown to officers at the time the dog was used to search for him. Shannon failed to meet his summary judgment burden on this point, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986), and Durham is entitled to summary judgment.

Costa Mesa Police Chief Snowden is entitled to qualified immunity. Chew, 27 F.3d at 1446-50. Because there is no basis for Monell liability to be imposed upon the City of Santa Ana, there is no basis for such liability to be imposed upon the City of Costa Mesa.

The Declarations and The State Law Claims

Even if the district court erred in concluding that the declarations of Peter Meade, M.D., and VanNess Bogardus, II, were inadmissible, they are insufficient to withstand the summary judgment motions in these cases.

Under the circumstances, it is not necessary to remand the dismissal of the state law claims to the district court for a reexamination of the four categories enumerated in 28

U.S.C. § 1367(c) in accordance with Executive Software N. Am., Inc. v. United States Dist. Ct., 24 F.3d 1545 (9th Cir. 1994). First of all, the district court properly dismissed all claims over which it had original jurisdiction. See 28 U.S.C. § 1367(c) (3). To require a remand for the court to specify subsection 1367(c) (3) as a specific ground for dismissal based on Executive Software (decided after the district court's order in these cases), would elevate form over substance. More importantly, the district court properly dismissed the state law claims without prejudice because they were insufficiently pleaded. Although Shannon and Brooks contended at oral argument that they should have been given leave to amend, they did not make this argument in their opening brief. The issue is therefore waived. Officers for Justice v. Civil Serv. Comm'n, 979 F.2d 721, 726 (9th Cir. 1992), cert. denied, 113 S. Ct. 1645 (1993).

CONCLUSION

We have considered the other arguments made by the appellants and conclude that no discussion is necessary. The summary judgments in favor of the defendants in the cases brought by Brooks and Shannon are AFFIRMED.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 93-56542
D.C. No. CV-92-00533-LHM (C
ORDER

FILED
MAR 22 1995
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

THOMAS SHANNON; CRAIG BROOKS,

Plaintiffs-Appellees,

v.

CITY OF COSTA MESA; CITY OF SANTA ANA; PAUL WALTERS, Chief of Police of the Santa Ana Police Department; RAUL LUNA; MICHAEL FLEET; ANTHONY BERTAGNA; WILLIAM LETIZIO; DAVE SNOWDEN; PAUL MCCARTHY; ROBERT DURHAM; BURTON SANTEE,

Defendants-Appellees.

Before: O'SCANNLAIN, T.G. NELSON, Circuit Judges, and MERHIGE,* District Judge.

Judges O'Scannlain, T.G. Nelson and Merhige vote to deny the petition for rehearing. Judges O'Scannlain and T.G. Nelson vote and to reject the suggestion for rehearing en banc, and Judge Merhige so recommends.

The full court was advised of the suggestion for rehearing en banc and no active judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Further, appellee City of Santa Ana's request to publish the disposition in this matter is denied.

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*Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

UNITED STATES DISTRICT COURT

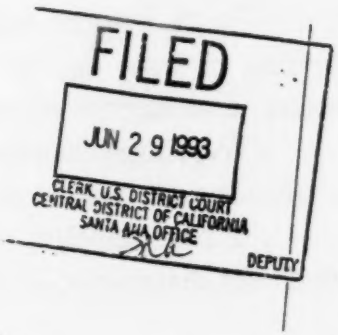
CENTRAL DISTRICT OF CALIFORNIA

Case No. 92-3397 LHM (JRx)

CRAIG BROOKS,

Plaintiff,

vs.



CITY OF COSTA MESA, et al.,

Defendants

ORDER GRANTING SUMMARY JUDGMENT

The motion of Defendants, CITY OF SANTA ANA and CHIEF PAUL WALTERS, for summary judgment against Plaintiff Brooks, after considering the moving and opposition presented to the Court, IT IS HEREBY ORDERED THAT the motion is GRANTED. Minute Order of 6/29/93 is incorporated herein.
DATED: 6/29/93

/s/ McLaughin

United States District Judge

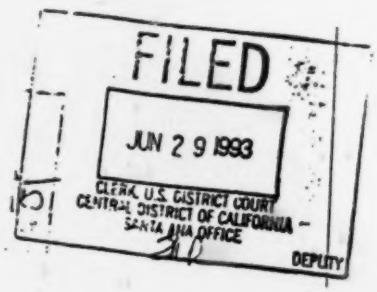
UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Case No. 92-3397 LHM (JRx)

THOMAS KEITH SHANNON,

Plaintiff,



vs.

CITY OF COSTA MESA, et al.,

Defendants

ORDER GRANTING SUMMARY JUDGMENT

The motion of Defendants, CITY OF SANTA ANA and CHIEF PAUL WALTERS, for summary judgment on the First Cause of Action and all defendants on the Second Cause of Action against Plaintiff Shannon, after considering the moving and opposition presented to the Court, IT IS HEREBY ORDERED THAT the motion is GRANTED. Minute Order of 6/29/93 is incorporated herein.

DATED: 6/29/93

/s/ McLaughin

United States District Judge

APX. D-1

APX. D-2